

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Carriage of Digital Television Broadcast)	CS Docket No. 98-120
Signals: Amendment to Part 76 of the)	
Commission's Rules)	

**REPLY COMMENTS OF
OVATION TV**

Ovation, LLC ("Ovation") submits these Reply Comments on the Commission's proposal to require dual carriage of all must-carry broadcast channels. Mandatory dual carriage would further limit the cable channel capacity available to independent programmers such as Ovation, thereby depriving viewers of the very programming diversity that the Commission seeks to foster.

Ovation TV is the only programming service dedicated to the arts. Ovation's mission is to "make life creative," with programming entertaining, inspiring and engaging the artist in all of us. Ovation is the only destination for "all things art," and its programming appeals to a multi-generational audience. Ovation's primetime programming features a different theme or genre each night – performance, people, visual arts, music and film – with weekends devoted to original programming.

Over the past two years, Ovation has made a concerted effort to develop partnerships with a variety of educational organizations and cultural institutions in cities throughout the United States. Ovation seeks to develop high-caliber, locally-relevant content available on its

linear channel and through local Video On Demand. Ovation also seeks to serve as a broad resource for educators who can integrate Ovation TV into school curricula.

Originally launched in 1996, Ovation TV relaunched on June 20, 2007 with nationwide distribution on DIRECTV. Ovation has experienced firsthand the intense competition for, and the significant challenges to, widespread cable distribution. Its affiliate sales personnel are traversing the United States to inform cable system operators of the new Ovation and are expanding Ovation TV's distribution system-by-system. If the Commission mandated both analog and digital distribution of the same broadcast channels, it would be depriving Ovation and other independent programmers of distribution opportunities, potentially sounding the death knell for more than a few programmers and reversing decades of Congressional and Commission efforts to foster the diversity of viewpoints available to the public:

The only certain result of forcing cable operators to carry duplicative broadcast channels is to ensure that innovative non-broadcast programming will be crowded out. This will ensure that customer preferences will be increasingly marginalized, and that new voices will have trouble emerging to speak in the marketplace in response to consumer needs and interests. This is not the result Congress hoped to secure.

Comments of Discovery Communications, LLC at 8. Ovation TV offers that "innovative non-broadcast programming" and seeks a fair chance to compete for cable distribution.

Broadcasters advocating the imposition of dual carriage obligations contend that advances in fiber optic and digital compression technology have created an environment in which "there may be no practical limitation on the number of speakers that may use the cable medium." Comments of National Association of Broadcasters and The Association for Maximum Service Television, Inc. ("NAB/MSTV Comments") at 13, quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994). However, the presumption that cable operators have spare capacity awaiting dual carriage is simply wrong. Cable operators have used

bandwidth for high speed Internet and other telecommunications applications. The rapidly expanding distribution of HD programming, which American viewers increasingly demand, further strains channel capacity. As a result, some cable programmers already “are being moved from analog to digital tiers” and others cannot gain distribution at all because “[e]ven capacity for digital programming remains tight.” Comments of the National Cable & Telecommunications Association (“NCTA Comments”) at 19. Ovation’s day-to-day experience confirms the absence of any new service launches on analog tiers and the “fierce battle for carriage” on the increasingly scarce channel slots on digital basic as reported by cable operators in this proceeding. *Id.* at 19-20; *see also* Comments of Time Warner Inc. (“Time Warner Comments”) at 5; Comments of Comcast Corporation at 20.

Mandatory carriage of the same broadcast channel in both analog and digital formats does not merely displace cable programmers on a one-for-one basis. Rather, mandatory dual broadcast carriage will preclude the carriage of *multiple* digital channels, *i.e.* the 6 MHz used for the distribution of each broadcast channel could be used to distribute up to 12 digital channels. Consequently, the “[c]ompelled duplicate carriage...would result in no digital carriage, or any carriage at all, for many cable programmers.” Time Warner Comments at 6. Thus, even though Ovation is the only programming service devoted to the arts and the only programming service partnering with local cultural institutions, cable subscribers will be deprived of any opportunity to view Ovation TV so that they can see two feeds of the same broadcast channel, potentially carrying the same programming as one or more other broadcast channels.

In the context of existing bandwidth constraints, mandatory dual carriage of the same broadcast channel poses no public interest benefit much less benefits that outweigh the

infringement of Ovation's constitutional rights. As the Commission previously recognized, and Messrs. Cooper and Massey argue compellingly, dual carriage of broadcasters forecloses other independent voices such as Ovation:

Indeed, the Commission observed that "mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system" by entirely shutting out, or displacing, independent and unaffiliated cable programmers who have no other outlet for their programming. In short, a dual-carriage rule would not add to the number of sources of speech; it can only diminish the number of speakers by shutting out sources that would otherwise be granted the additional channels consumed by broadcasters granted a right to dual-carriage.

See C. Cooper and J. Massey, *The Commission's Proposed Digital Carriage Requirement Would Violate the Constitution* (July 16, 2007) at 16 (note omitted).

The record in this proceeding provides no factual or legal basis to "shut out" Ovation and other independent voices from cable distribution. The availability of multiple digital channels such as Ovation TV, offering diverse and entertaining programming that consumers want to see, will foster the digital transition far more than the repetition of broadcast channels in an analog format. Such repetition will serve only to prolong consumers' reliance on analog television "receivers" that will not be capable of receiving post-transition broadcast television signals. For those consumers who want to continue to use their analog sets, NAB/MSTV concede that "[d]igital/analog converters are expected to be available to consumers before the transition for less than 100 dollars." NAB/MSTV Comments at 11, n.11. Ovation respectfully submits that consumer choices in the marketplace -- not government directive -- should decide who wins and loses in the competition for cable programming distribution and

viewership. Ovation should be permitted to compete fairly for cable distribution – the Constitution requires nothing less.

Respectfully submitted,

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